

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

1			
2			
3	MALIK JONES,)	No. C 07-04277 CW (PR)
4)	
5	Plaintiff,)	ORDER OF SERVICE AND
6	v.)	ADDRESSING PENDING MOTIONS
7	MIKE EVANS, Warden, et al.,)	(Docket nos. 7, 10, 12)
8	Defendants.)	

9 Plaintiff Malik Jones, a state prisoner currently incarcerated
10 at High Desert State Prison (HDSP), has filed the present pro se
11 civil rights action pursuant to 42 U.S.C. § 1983 alleging a
12 violation of his constitutional rights while incarcerated at
13 Salinas Valley State Prison (SVSP). His motion for leave to
14 proceed in forma pauperis has been granted. Venue is proper in
15 this district because the events giving rise to the action occurred
16 at SVSP, which is located in this district. See 28 U.S.C.
17 § 1371(b).

18 BACKGROUND

19 Plaintiff alleges that while he was incarcerated at SVSP,
20 Defendant SVSP Officer Bailey created a "false 128G chonol [sic]
21 with fabricated information on Plaintiff stating plaintiff was a
22 child molester/had lewd and or lascivious crimes against children."
23 (Compl. at 3). Plaintiff further alleges that Defendant Bailey
24 distributed the false 128G chrono to other inmates in an effort to
25 "get Plaintiff killed or seriously injured." (Id.) In addition,
26 Plaintiff, who is wheelchair-bound, claims that Defendant Bailey
27 "pushed Plaintiff out of his wheelchair" during a verbal
28 altercation; however, Plaintiff does not specify when and where

1 this incident took place. (Id.) Plaintiff claims that Defendant
2 Bailey's conduct violated his Eighth Amendment protection from
3 "cruel and unusual punishment" and his Fourteenth Amendment
4 guarantees of due process and equal protection.

5 Plaintiff's next claim involves Defendants SVSP Warden Mike
6 Evans, SVSP Correctional Counselor Martines, SVSP Sergeant L.
7 Washington, SVSP Officer E. Contrazs and an unidentified female
8 officer, SVSP Officer Jane Doe. It concerns Plaintiff's transfer
9 to High Desert State Prison (HDSP). (Id. at 5.) He alleges
10 Defendants violated his due process rights by "not stoping transfer
11 after Plaintiff and Plaintiff's mother Doris Reed informed them
12 Plaintiffs safety and security would be put endanger if transferred
13 due to false 128G chronol [sic]." (Id.) Plaintiff contends that
14 at some point he complained to Defendant Martines about his
15 scheduled transfer to HDSP. According to the complaint, Defendant
16 Martines did nothing to stop Plaintiff from being transferred.
17 (Id. at 5.)

18 Plaintiff's third claim involves Defendant SVSP Sergeant
19 Washington, as well as Defendants SVSP Correctional Officers D.
20 Lang, Contrazs and Jane Doe. The incident allegedly occurred at
21 the Correctional Treatment Center (CTC) after a visit with a Dr.
22 Bowman, who was treating Plaintiff for back spasms. After
23 Plaintiff's medical visit, Defendants Lang, Washington, Contrazs
24 and Jane Doe entered the examiner's room, confiscated his property,
25 verbally harassed him, and shackled his hands, waist and feet.
26 (Id. at 6.) The officers then "threw [Plaintiff] in [his]
27 wheelchair" and took him outside the prison. (Id.) Defendant Lang
28 attempted to break Plaintiff's thumb by "bending it in the wrong

1 direction." (Id.) The officers then "threw" Plaintiff to the
2 ground, causing [him] to hit [his] head on ground, causing pain and
3 injury." (Id.) The officers then dragged Plaintiff to a van with
4 two other inmates. (Id.) Plaintiff claims the inmates witnessed
5 officers "assaulting Plaintiff," and one of the inmates is named
6 "Brown." (Id.) The officers decided to take Plaintiff, instead,
7 to another car. (Id.) Plaintiff claims that, while he was being
8 dragged to the car, Defendant Washington "attempted to break
9 Plaintiff's wrist" and that Plaintiff's head was scraped along the
10 ground, "causing more pain and injury to [his] head." Plaintiff
11 then claims that he was thrown across the back seat of the car,
12 that the officers "used car door to repeatedly slam Plaintiff's
13 knees between it," and that one of the officers "slammed car door
14 with force so that it would hit Plaintiff in the head"
15 (Id.) Finally, he claims that on the way to HDSP, Defendants Lang
16 and Jane Doe forced Plaintiff to drink a "liquid substance" while
17 "laughing [and] stating its [sic] your medication." (Id.)
18 Plaintiff contends that these officers used excessive physical
19 force in violation of the Eighth Amendment.

20 Plaintiff claims that he filed several 602 inmate appeals, but
21 they were screened out. Plaintiff alleges he eventually exhausted
22 his administrative remedies with respect to these claims. He seeks
23 monetary compensation and injunctive relief for his physical and
24 emotional injuries.

25 DISCUSSION

26 I. Standard of Review

27 A federal court must conduct a preliminary screening in any
28 case in which a prisoner seeks redress from a governmental entity

1 or officer or employee of a governmental entity. See 28 U.S.C.
2 § 1915A(a). It its review, the court must identify cognizable
3 claims and dismiss any claims that are frivolous, malicious, fail
4 to state a claim upon which relief may be granted or seek monetary
5 relief from a defendant who is immune from such relief. See id.
6 § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally
7 construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
8 699 (9th Cir. 1988).

9 To state a claim under 42 U.S.C. § 1983, a plaintiff must
10 allege two essential elements: (1) that a right secured by the
11 Constitution or laws of the United States was violated, and
12 (2) that the alleged violation was committed by a person acting
13 under the color of state law. See West v. Atkins, 487 U.S. 42, 48
14 (1988).

15 A supervisor may be liable under § 1983 upon a showing of
16 personal involvement in the constitutional deprivation or a
17 sufficient causal connection between the supervisor's wrongful
18 conduct and the constitutional violation. Redman v. County of San
19 Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc) (citation
20 omitted). A supervisor therefore generally "is only liable for
21 constitutional violations of his subordinates if the supervisor
22 participated in or directed the violations, or knew of the
23 violations and failed to act to prevent them." Taylor v. List, 880
24 F.2d 1040, 1045 (9th Cir. 1989). A supervisor may be liable for
25 implementing "a policy so deficient that the policy itself is a
26 repudiation of constitutional rights and is the moving force of the
27 constitutional violation." Redman, 942 F.2d at 1446; see Jeffers
28 v. Gomez, 267 F.3d 895, 917 (9th Cir. 2001).

1 II. Plaintiff's Claims

2 A. Injunctive Relief Claims

3 Plaintiff seeks both injunctive relief and money damages. The
4 jurisdiction of the federal courts depends on the existence of a
5 "case or controversy" under Article III of the Constitution. Pub.
6 Util. Comm'n of State of Cal. v. FERC, 100 F.3d 1451, 1458 (9th
7 Cir. 1996). A claim is considered moot if it has lost its
8 character as a present, live controversy and if no effective relief
9 can be granted; where the question sought to be adjudicated has
10 been mooted by developments subsequent to filing of the complaint,
11 no justiciable controversy is presented. Flast v. Cohen, 392 U.S.
12 83, 95 (1968). Where injunctive relief is requested, questions of
13 mootness are determined in light of the present circumstances. See
14 Mitchell v. Dupnik, 75 F.3d 517, 528 (9th Cir. 1996).

15 When an inmate has been transferred to another prison and
16 there is no reasonable expectation nor demonstrated probability
17 that he will again be subjected to the prison conditions from which
18 he seeks injunctive relief, the claim for injunctive relief should
19 be dismissed as moot. See Dilley v. Gunn, 64 F.3d 1365, 1368-69
20 (9th Cir. 1995). A claim that the inmate might be re-transferred
21 to the prison where the injury occurred is too speculative to
22 overcome mootness. Id.

23 Because all Plaintiff's claims for injunctive relief are
24 against SVSP officials and he is no longer incarcerated at SVSP,
25 his claims are DISMISSED as moot. See Mitchell, 75 F.3d at 528.

26 B. Eighth Amendment Claims

27 A prisoner has the right to be free from cruel and unusual
28 punishment, including physical abuse by prison guards. Whenever

1 prison officials stand accused of using excessive physical force in
2 violation of the Eighth Amendment, the core judicial inquiry is
3 whether force was applied in a good-faith effort to maintain or
4 restore discipline, or maliciously and sadistically to cause harm.
5 Hudson v. McMillian, 503 U.S. 1, 6 (1992) (citing Whitley v.
6 Albers, 475 U.S. 312, 317 (1986)).

7 Plaintiff alleges two separate instances in which he suffered
8 excessive force. First, he alleges that Defendant Bailey pushed
9 him out of his wheelchair during a verbal altercation. (Compl. at
10 3.) Second, Plaintiff alleges that he was brutally beaten and
11 abused by prison guards during his transfer to HDSP. (Id. at 5-7.)
12 Based on his allegations, the Court is unable to say that Plaintiff
13 can prove no set of facts which would entitle him to relief in
14 support of his claims of the malicious and sadistic use of force.
15 Accordingly, the Court finds cognizable Plaintiff's Eighth
16 Amendment claim against Defendants Bailey, Lang, Washington,
17 Contrazs and Jane Doe.

18 Plaintiff's allegations relating to the incident of excessive
19 force during his transfer to HDSP also state a claim for deliberate
20 indifference to his serious medical needs. See Estelle v. Gamble,
21 429 U.S. 97, 104 (1976) (deliberate indifference to serious medical
22 needs presents a cognizable claim for violation of the Eighth
23 Amendment). Plaintiff states that after he was abused by
24 Defendants Lang, Washington, Contrazs and Jane Doe, he was "laid
25 across back seat of car in chronic pain with massive headache
26 fading in an out of consciousness while being forcibly taken
27 to . . . HDSP." (Compl. at 6.) He claims the correctional
28 officers continued to transport him to HDSP and failed to seek

1 medical treatment for Plaintiff's injuries. (Id.) Accordingly,
2 Plaintiff has adequately pled cognizable claims against named
3 Defendants Lang, Washington, Contrazs and Jane Doe for deliberate
4 indifference to his medical needs.

5 C. Claim Relating to Falsified 128G Chrono

6 Plaintiff alleges that the falsified 128G chrono distributed
7 to other inmates by Defendant Bailey violated his due process
8 rights.

9 A prisoner has no constitutionally guaranteed immunity from
10 being falsely or wrongly accused. Sprouse v. Babcock, 870 F.2d
11 450, 452 (8th Cir. 1989); Freeman v. Rideout, 808 F.2d 949, 951 (2d
12 Cir. 1986), cert. denied, 485 U.S. 982 (1988). While Plaintiff
13 claims the 128G chronos were false, his allegations do not state a
14 due process violation. Plaintiff does not contend that he did not
15 receive procedural due process -- his claim is simply that the
16 report was false. Therefore, the Court finds that Plaintiff's
17 allegations that Officer Bailey falsified the chrono is not in of
18 itself sufficient to state a constitutional injury under the Due
19 Process Clause. See Paul v. Davis, 424 U.S. 693, 711-14 (1976);
20 see also Reyes v. Supervisor of Drug Enforcement Admin., 834 F.2d
21 1093, 1097 (1st Cir. 1987) (no due process claim for false
22 information maintained by police department); Pruett v. Levi, 622
23 F.2d 256, 258 (6th Cir. 1980) (mere existence of inaccuracy in FBI
24 criminals files does not state constitutional claim). Therefore,
25 his due process claim against Defendant Bailey is DISMISSED with
26 prejudice.

27 Plaintiff further alleges that the 128G chorno was falsified
28 and distributed to other inmates in an effort to cause harm or even

1 death to Plaintiff. Such a claim amounts to a claim of deliberate
2 indifference to Plaintiff's safety needs.

3 The Eighth Amendment requires that prison officials take
4 reasonable measures to guarantee the safety of prisoners. Farmer
5 v. Brennan, 511 U.S. 825, 832 (1994). In particular, prison
6 officials have a duty to protect prisoners from violence at the
7 hands of other prisoners. Id. at 833; Hearns v. Terhune, 413 F.3d
8 1036, 1040 (9th Cir. 2005); Hoptowit v. Ray, 682 F.2d 1237, 1250
9 (9th Cir. 1982); Gillespie v. Civiletti, 629 F.2d 637, 642 & n.3
10 (9th Cir. 1980). The failure of prison officials to protect
11 inmates from attacks by other inmates or from dangerous conditions
12 at the prison violates the Eighth Amendment only when two
13 requirements are met: (1) the deprivation alleged is, objectively,
14 sufficiently serious; and (2) the prison official is, subjectively,
15 deliberately indifferent to inmate safety. Farmer, 511 U.S. at
16 834; Hearns, 413 F.3d at 1040-41.

17 Plaintiff does not allege that he suffered any harm as a
18 result of Defendant Bailey's alleged conduct. In fact, Plaintiff
19 states he was "safe for the most part at SVSP." (Compl. at 4.) He
20 claims that a fellow inmate named Thomas Edwards alerted him to the
21 false 128G chrono and, with inmate Edwards's help, he was able to
22 "explain to most inmates on D-Yard that 128G chronol [sic] is false
23 and Defendant Bailey was doing this to get Plaintiff killed or
24 seriously injured." (Id. at 3.) However, a prisoner need not
25 wait until he is actually assaulted to state a claim and obtain
26 relief. See Farmer, 511 U.S. at 845; Woodhous v. Virginia, 487
27 F.2d 889, 890 (4th Cir. 1973); Stickney v. List, 519 F. Supp. 617,
28 620 (D. Nev. 1981).

1 Accordingly, Plaintiff has stated a cognizable Eighth
2 Amendment claim for deliberate indifference to his safety needs
3 against Defendant Bailey based on his allegations related to the
4 falsified 128G chrono.

5 D. Equal Protection Claims

6 "The Equal Protection Clause of the Fourteenth Amendment
7 commands that no State shall 'deny to any person within its
8 jurisdiction the equal protection of the laws,' which is
9 essentially a direction that all persons similarly situated should
10 be treated alike." City of Cleburne v. Cleburne Living Center, 473
11 U.S. 432, 439 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216
12 (1982)). A plaintiff alleging denial of equal protection under 42
13 U.S.C. § 1983 must plead intentional unlawful discrimination or
14 allege facts that are at least susceptible of an inference of
15 discriminatory intent. See Monteiro v. Tempe Union High School
16 Dist., 158 F.3d 1022, 1026 (9th Cir. 1998).

17 Plaintiff does not argue that the mistreatment alleged in any
18 of his claims occurred because of his race. Accordingly, his equal
19 protection claims are DISMISSED without prejudice.

20 E. Claim Challenging to Transfer to HDSP

21 Plaintiff's due process claim challenging his transfer to HDSP
22 is not cognizable because it is well established that prisoners
23 have no constitutional right to incarceration in a particular
24 institution. See Olim v. Wakinekona, 461 U.S. 238, 244-48 (1983);
25 Meachum v. Fano, 427 U.S. 215, 224 (1976). A prisoner's liberty
26 interests are sufficiently extinguished by his conviction that the
27 State may generally transfer him to any of its institutions, to
28 prisons in another State or to federal prisons, without offending
the Constitution. See Rizzo v. Dawson, 778 F.2d 527, 530 (9th Cir.

1 1985) (citing Meachum, 427 U.S. at 225) (intrastate prison transfer
2 does not implicate Due Process Clause); Olim, 461 U.S. at 244-48
3 (interstate prison transfer does not implicate Due Process
4 Clause)). A non-consensual transfer is not per se violative of
5 either due process or equal protection rights, see Johnson v.
6 Moore, 948 F.2d 517, 519 (9th Cir. 1991); Stinson v. Nelson, 525
7 F.2d 728, 730 (9th Cir. 1975), and no due process protections such
8 as notice or a hearing need be afforded before a prisoner is
9 transferred, even if the transfer is for disciplinary reasons or to
10 a considerably less favorable institution, see Montanye v. Haymes,
11 427 U.S. 236, 242 (1976); Johnson, 948 F.2d at 519. "It is well
12 settled that the decision where to house inmates is at the core of
13 prison administrators' expertise." McKune v. Lile, 536 U.S. 24, 39
14 (2002).

15 However, if prison officials deliberately transferred a
16 prisoner to an institution where he would be in danger from which
17 they could not protect him, then such an act could amount to an
18 Eighth Amendment violation. Plaintiff has not alleged that he was
19 in any more danger at HDSP than he was at SVSP. Rather, he alleges
20 that the 128G chorno was distributed to inmates at SVSP and does
21 not allege that Defendant Bailey distributed it at HDSP.

22 Accordingly, Plaintiff's due process claim challenging his
23 transfer to HDSP is DISMISSED without prejudice.

24 If Plaintiff can truthfully allege facts that would support a
25 claim that particular prison officials transferred him to HDSP with
26 deliberate indifference to particular facts establishing serious
27 danger to his safety there, he may move for leave to amend his
28 complaint.

1 F. State Law Claims

2 In addition to the federal claims discussed above, Plaintiff
3 asserts state law claims against Defendants. Because his state law
4 claims arise out of the same acts and events giving rise to his
5 federal claims, the Court will exercise supplemental jurisdiction
6 over the claims. See 28 U.S.C. § 1367(a).

7 Plaintiff alleges that he is entitled to relief under
8 California tort law for the officers' attack on him during his
9 transfer. He asserts supplementary state law claims that the
10 actions of Defendants Washington, Lang, and Contrazs constituted
11 both negligence and the intentional torts of assault and battery.
12 The Court finds his state law claims cognizable.

13 III. Defendants

14 Plaintiff has named and directly linked to his surviving
15 allegations of excessive force Defendants Bailey, Washington Lang
16 and Contrazs. Accordingly, the Court will order service of the
17 complaint on these Defendants.

18 Plaintiff identifies one Doe Defendant who participated in the
19 incident where he was allegedly brutalized during a prison
20 transfer. The use of "Doe" to identify a defendant is not favored
21 in the Ninth Circuit. Gillespie v. Civiletti, 629 F.2d 637, 642
22 (9th Cir. 1980). However, where the identity of alleged defendants
23 cannot be known prior to the filing of a complaint, the plaintiff
24 should be given an opportunity through discovery to identify them.
25 See Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999).

26 Accordingly, the claims against Defendant Jane Doe are
27 DISMISSED from this action without prejudice. Should Plaintiff
28 learn Defendant Jane Doe's identity, he may move to file an amended

1 complaint to add her as a named defendant. See Brass v. County of
2 Los Angeles, 328 F.3d 1192, 1195-98 (9th Cir. 2003).

3 IV. Plaintiff's Pending Motions

4 A. Motion for Temporary Restraining Order

5 Plaintiff has filed a motion for a temporary restraining order
6 (TRO) and/or a preliminary injunction (docket no 7). The motion
7 requests that he be granted an "emergency transfer" out of HDSP to
8 ensure his safety and security. Plaintiff claims that, since he
9 arrived at HDSP, he "has been subjected to ongoing constant
10 retaliation, harassment, [and] intimidation" (Id.)

11 Because HDSP is not in this judicial district, Plaintiff must
12 present any claims regarding his conditions of confinement at that
13 prison in the United States District Court for the Eastern District
14 of California. Therefore, Plaintiff's motion for a TRO and/or a
15 preliminary injunction (docket no. 7) is DENIED without prejudice
16 to filing an action in the Eastern District of California, where
17 HDSP is located. The instant action will be limited to damages for
18 Defendants' actions or omissions while Plaintiff was incarcerated
19 at SVSP.

20 B. Motion for Summary Judgment

21 Plaintiff has filed a motion for summary judgment. He alleges
22 that, because he has submitted "overwhelming evidence" and because
23 the defendants have failed to respond, he is entitled to summary
24 judgment under Fed. R. Civ. P. 56(c).

25 Under Rule 56 of the Federal Rules of Civil Procedure, summary
26 judgment may be entered "if the pleadings, the discovery and
27 disclosure materials on file, and any affidavits show that there is
28 no genuine issue as to any material fact and that the movant is

1 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).
2 In the present case, Defendants have not yet had an opportunity to
3 defend this action because they have not yet been served.
4 Therefore, Plaintiff's motion for summary judgment (docket no. 10)
5 is DENIED.

6 C. Motion for Default Judgment

7 Plaintiff has also filed a motion for default judgment.

8 Under Rule 55 of the Federal Rules of Civil Procedure,
9 judgment by default may be entered "[w]hen a party against whom
10 affirmative relief is sought has failed to plead or otherwise
11 defend" as provided by these rules. Fed. R. Civ. P. 55(a). In the
12 present case, Defendants have not failed to defend this action, and
13 the facts alleged by Plaintiff do not entitle him to an entry of
14 default against them. The complaint has not been served on
15 Defendants.

16 Accordingly, Plaintiff's request for default judgment (docket
17 no. 12) is DENIED.

18 CONCLUSION

19 For the foregoing reasons, the Court orders as follows:

20 1. Plaintiff's claims for injunctive relief are DISMISSED as
21 moot.

22 2. Plaintiff has adequately alleged a cognizable Eighth
23 Amendment claim against Defendants Bailey, Washington, Lang and
24 Contrazs for the use of excessive force.

25 3. Plaintiff has adequately pled cognizable claims against
26 named Defendants Lang, Washington and Contrazs for deliberate
27 indifference to his medical needs.

28 4. Plaintiff's due process claim against Defendant Bailey

1 related to the alleged distribution of a falsified 128G chrono is
2 DISMISSED WITH PREJUDICE. However, the Court finds that Plaintiff
3 has stated a cognizable Eighth Amendment claim for deliberate
4 indifference to his safety needs against Defendant Bailey based on
5 his allegations relating to the falsified 128G chrono.

6 5. Plaintiff's equal protection claims are DISMISSED WITHOUT
7 PREJUDICE.

8 6. Plaintiff's due process claim against Defendants Evans,
9 Martines, Washington and Contrazs challenging his transfer to HDSP
10 is DISMISSED WITHOUT PREJUDICE.

11 7. The Court asserts SUPPLEMENTAL JURISDICTION over
12 Plaintiff's state law claims.

13 8. Plaintiff's claims against Defendant Jane Doe are
14 DISMISSED WITHOUT PREJUDICE.

15 9. The Clerk of the Court shall mail a Notice of Lawsuit and
16 Request for Waiver of Service of Summons, two copies of the Waiver
17 of Service of Summons, a copy of the complaint and all attachments
18 thereto (docket no. 1) and a copy of this Order to SVSP Sergeant L.
19 Washington and SVSP Correctional Officers Bailey, D. Lang and E.
20 Contrazs. The Clerk of the Court shall also mail a copy of the
21 complaint and a copy of this Order to the State Attorney General's
22 Office in San Francisco. Additionally, the Clerk shall mail a copy
23 of this Order to Plaintiff.

24 10. Defendants are cautioned that Rule 4 of the Federal Rules
25 of Civil Procedure requires them to cooperate in saving unnecessary
26 costs of service of the summons and complaint. Pursuant to Rule 4,
27 if Defendants, after being notified of this action and asked by the
28 Court, on behalf of Plaintiff, to waive service of the summons,

1 fail to do so, they will be required to bear the cost of such
2 service unless good cause be shown for their failure to sign and
3 return the waiver form. If service is waived, this action will
4 proceed as if Defendants had been served on the date that the
5 waiver is filed, except that pursuant to Rule 12(a)(1)(B),
6 Defendants will not be required to serve and file an answer before
7 sixty (60) days from the date on which the request for waiver was
8 sent. (This allows a longer time to respond than would be required
9 if formal service of summons is necessary.) Defendants are asked
10 to read the statement set forth at the foot of the waiver form that
11 more completely describes the duties of the parties with regard to
12 waiver of service of the summons. If service is waived after the
13 date provided in the Notice but before Defendants have been
14 personally served, the Answer shall be due sixty (60) days from the
15 date on which the request for waiver was sent or twenty (20) days
16 from the date the waiver form is filed, whichever is later.

17 11. Defendants shall answer the complaint in accordance with
18 the Federal Rules of Civil Procedure. The following briefing
19 schedule shall govern dispositive motions in this action:

20 a. No later than ninety (90) days from the date their
21 answer is due, Defendants shall file a motion for summary judgment
22 or other dispositive motion. The motion shall be supported by
23 adequate factual documentation and shall conform in all respects to
24 Federal Rule of Civil Procedure 56. If Defendants are of the
25 opinion that this case cannot be resolved by summary judgment, they
26 shall so inform the Court prior to the date the summary judgment
27 motion is due. All papers filed with the Court shall be promptly
28

1 served on Plaintiff.

2 b. Plaintiff's opposition to the dispositive motion
3 shall be filed with the Court and served on Defendants no later
4 than sixty (60) days after the date on which Defendants' motion is
5 filed. The Ninth Circuit has held that the following notice should
6 be given to pro se plaintiffs facing a summary judgment motion:

7 The defendants have made a motion for summary
8 judgment by which they seek to have your case dismissed.
9 A motion for summary judgment under Rule 56 of the
Federal Rules of Civil Procedure will, if granted, end
your case.

10 Rule 56 tells you what you must do in order to
11 oppose a motion for summary judgment. Generally, summary
12 judgment must be granted when there is no genuine issue
13 of material fact -- that is, if there is no real dispute
14 about any fact that would affect the result of your case,
15 the party who asked for summary judgment is entitled to
16 judgment as a matter of law, which will end your case.
17 When a party you are suing makes a motion for summary
18 judgment that is properly supported by declarations (or
19 other sworn testimony), you cannot simply rely on what
20 your complaint says. Instead, you must set out specific
21 facts in declarations, depositions, answers to
interrogatories, or authenticated documents, as provided
in Rule 56(e), that contradict the facts shown in the
defendant's declarations and documents and show that
there is a genuine issue of material fact for trial. If
you do not submit your own evidence in opposition,
summary judgment, if appropriate, may be entered against
you. If summary judgment is granted [in favor of the
defendants], your case will be dismissed and there will
be no trial.

22 See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en
23 banc).

24 Plaintiff is advised to read Rule 56 of the Federal Rules of
25 Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)
26 (party opposing summary judgment must come forward with evidence
27 showing triable issues of material fact on every essential element
28 of his claim). Plaintiff is cautioned that because he bears the

1 burden of proving his allegations in this case, he must be prepared
2 to produce evidence in support of those allegations when he files
3 his opposition to Defendants' dispositive motion. Such evidence
4 may include sworn declarations from himself and other witnesses to
5 the incident, and copies of documents authenticated by sworn
6 declaration. Plaintiff will not be able to avoid summary judgment
7 simply by repeating the allegations of his complaint.

8 c. If Defendants wish to file a reply brief, they shall
9 do so no later than thirty (30) days after the date Plaintiff's
10 opposition is filed.

11 d. The motion shall be deemed submitted as of the date
12 the reply brief is due. No hearing will be held on the motion
13 unless the Court so orders at a later date.

14 12. Discovery may be taken in this action in accordance with
15 the Federal Rules of Civil Procedure. Leave of the Court pursuant
16 to Rule 30(a)(2) is hereby granted to Defendants to depose
17 Plaintiff and any other necessary witnesses confined in prison.

18 13. All communications by Plaintiff with the Court must be
19 served on Defendants, or Defendants' counsel once counsel has been
20 designated, by mailing a true copy of the document to Defendants or
21 Defendants' counsel.

22 14. It is Plaintiff's responsibility to prosecute this case.
23 Plaintiff must keep the Court informed of any change of address and
24 must comply with the Court's orders in a timely fashion

25 15. Extensions of time are not favored, though reasonable
26 extensions will be granted. Any motion for an extension of time
27 must be filed no later than fifteen (15) days prior to the deadline
28 sought to be extended.

1 16. Plaintiff's motion for a TRO and/or a preliminary
2 injunction (docket no. 7) is DENIED without prejudice to filing an
3 action in the Eastern District of California.

4 17. Because the complaint has not been served, the following
5 motions are DENIED as premature: "Motion for Summary Judgment"
6 (docket no. 10) and "Motion Moving for Default Judgment" (docket
7 no. 12).

8 18. This Order terminates Docket nos. 7, 10 and 12.

9 IT IS SO ORDERED.

10 DATED: 9/19/08



CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

MALIK JONES,

Plaintiff,

v.

MIKE EVANS, WARDEN et al,

Defendant.

Case Number: CV07-04277 CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on September 19, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Malik Jones K-09065
High Desert State Prison
Facility D-5-109
P.O. Box 3030
Susanville, CA 96127

Dated: September 19, 2008

Richard W. Wieking, Clerk
By: Clara Pierce, Deputy Clerk

United States District Court
For the Northern District of California